READING MARINE INSURANCE CONTRACTS: DETERMINING THE SCOPE OF COVER

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Marine insurance – exclusions – exceptions – causation – delay – slaves

The scope of cover under marine insurance policies is typically delineated by a combination of express insuring clauses that identify risks that are covered and an appreciable number of limitations on cover either express in the policy or implied by virtue of the Marine Insurance Act 1906. The standard London market marine insurance forms (known as 'Institute clauses') contain a significant number of express limitations, all of which are labelled 'exclusions'. This article discusses the different types of clause that combine to delineate the scope of cover, with particular reference to the most commonly encountered Institute clauses for the insuring of ships or cargoes. In so doing, it demonstrates that policy limitations exhibit a diversity of characterisation: some deny cover otherwise granted by the insuring clauses and may properly be termed 'exclusions'; others serve not to reduce the scope of cover granted but rather to clarify the proper understanding of the insuring clauses and may be termed 'exceptions'; and a third group should be read as integral elements of the insuring clauses. The implied limitations stated in the Marine Insurance Act, s 55(2) constitute exceptions, at least as originally conceived, although changes in insurance law's doctrine of proximate

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cause may require the limitation in respect of losses proximately caused by delay, which is considered in detail, to be re-conceptualised as an exclusion. A limitation's correct characterisation impacts on whether the policy responds to a loss, either at all or in cases of concurrent proximate causes, and upon the onus of proof borne by an insured claiming under the policy.

I. INTRODUCTION

The scope of cover provided under marine insurance policies governed by English law results from the interaction of different contractual norms, in addition to a number of underlying legal principles which are not the concern of this article.[1] The relevant contractual provisions may be express in the policy, which will almost invariably incorporate one or more sets of standard London market forms (known as 'Institute clauses'), or implied by virtue of the Marine Insurance Act 1906. For the purposes of this article, three types of contractual norm may be distinguished. First, *insuring clauses* state a range of risks or liabilities in relation to which the policy provides cover. Secondly, *exclusions* modify the scope of cover otherwise provided by carving out certain risks that otherwise fall within the scope of the insuring clauses and expressly removing them from the insurance provided. London market hull forms, indeed, emphasise the overriding nature of a number of exclusions by stating, in bold type, that they 'shall be paramount and shall override anything contained in this insurance inconsistent therewith.'[2] Thirdly, *exceptions* amplify the scope of cover provided under the insuring clauses without altering the scope of cover otherwise provided. On a true construction of the insuring

[1] For example, the defences afforded to insurers in relation to unseaworthiness or illegality.

[2] Eg, Institute Time Clauses Hulls (1/10/83), introductory words to cll 24-27.

clauses, the content of an exception is not insured in any event. As a limitation inherent in a contractual concept, an exception, unless embodying a public policy constraint, can of course be removed by the terms of the insurance (thereby affording the relevant concept an enhanced scope), but is otherwise implicit as a matter of construction of the relevant insured perils. A number of limitations, however, were codified in s 55(2) of the Marine Insurance Act 1906, some of which have in turn been expressly restated in various sets of Institute clauses. Confusingly, the Institute clauses apply the label 'exclusions' to all limitations, thereby obscuring their technically correct characterisation.

This article will consider each of these types of contractual provision and the interplay between them, including in the context of the Marine Insurance Act 1906 and the most commonly encountered Institute hull clauses and cargo clauses. A particular point of focus will be losses occasioned by concurrent proximate causes of loss of or damage to the insured property only one of which falls within the terms of the insuring clauses. The response of a policy will be seen to depend on contractual construction (including the correct characterisation of any express or implied limitations on cover) rather than the operation of abstract rules of law. Extended consideration will be given to the approach of marine insurance law to losses dependent in some way on delay, in which context there arises a further level of interplay, namely between the characterisation of limitations on cover and principles of causation, notably the law's understanding of the concept of proximate cause.

II. INSURING CLAUSES

The traditional London market marine policy, namely the Lloyd's SG policy (first formulated as a market standard in 1779[3] and in use until the 1980s), and most Institute clauses from their inception in the 1880s[4] to the present day offer cover on a 'named perils' basis, meaning that cover is provided against loss of or damage to the insured property that the insured proves[5] to have been caused by one or a combination of a list of specified perils. Clearly, insurers are not liable for loss caused by any other peril simply because it does not fall within the scope of cover in the first place; there is no need for the policy to say anything about such other perils. The Marine Insurance Act 1906 spells out this basic point. Section 55(1) provides as follows:

> Subject to any provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

Although phrased predominantly in terms of causation, and fulfilling the function of articulating the proximate cause rule as representing the operative causation rule in the absence of contrary stipulation in the Act or the contract, the subsection makes clear that liability is confined to losses caused by insured perils and does not extend to losses caused by perils that do not feature among those insured.

[3] Although largely reflecting earlier forms.

[4] The first set of Institute clauses, for time policies on ships, was promulgated in 1888.

[5] *Rhesa Shipping Co SA v Edmunds (The Popi M)* [1985] 1 WLR 948 (HL).

By way of exception to the named perils approach, however, cargo insurance against marine risks is generally written on an 'all risks' basis under the Institute cargo Clauses (A) (1/1/09).[6] The insurer accepts liability for loss or damage caused by any peril that constitutes a 'risk', on the correct construction of that term, or any combination of such perils. All the insured has to prove in order to recover on a claim is that, on a balance of probabilities, the cause of the loss or damage was such a 'risk' or a combination of such risks, but there is no need to prove precisely which risk or risks impacted on the insured goods.[7] As a matter of contractual construction, the precise cause of the loss or damage is irrelevant since the insurer accepts liability for loss or damage caused by any and all risks. Precisely which risk was responsible for the loss is, therefore, contractually irrelevant. Under a named perils policy, in contrast, there is no such general acceptance of liability. The insurer's acceptance of liability is confined to loss of damage caused by one or more perils listed in the insuring clause. It follows that the insured must prove, on a balance of probabilities, that the loss or damage sustained was caused by one or a combination of the listed perils, and to do that the insured must necessarily identify the relevant peril or perils. In *The Salem*,[8] Mustill J rejected as 'entirely misconceived' an argument that a named perils cargo policy that, as was customary at the time, combined the Lloyd's SG policy with two sets of Institute clauses should not be interpreted in an overly

[6] Narrower cover on a named perils basis under the Institute Cargo Clauses (C) (1/1/09) may sometimes suffice where the goods are susceptible to only a limited range of dangers. The Institute Cargo Clauses (B) (1/1/09) also adopt a named perils approach, but it is unclear whether they are ever used.

[7] *British & Foreign Marine Insurance Co v Gaunt* [1921] 1 AC 41 (HL).

[8] *Shell Petroleum Co Ltd v Gibbs (The Salem)* [1982] QB 946 (Com Ct) 959.

technical manner but in a broader commercial sense so as to benefit the insured, Shell Petroleum Company. He continued as follows:[9]

> It has been recognised for centuries that the Lloyd's S.G. form confers a haphazard kind of cover, full of duplication and gaps. The addition of the Institute cargo clauses removes some of the anomalies, but not all. If the assured wishes to have a seamless cover, insuring against all forms of fortuitous losses in transit, he can obtain it by insuring on the terms of the Institute cargo clauses (all risks) … But this comprehensive form of insurance is more expensive. Shell could, if they had wished, have made it a term of their c.i.f. purchase that the sellers would provide all risk cover. They chose not to do so. This being the case, there is no warrant for criticising the underwriters for insisting that Shell found their claim on the cover for which they have paid, receiving neither less nor more than they were entitled to on the true interpretation of the contract of insurance.

Likewise, in *The Milasan*,[10] the court rejected an argument that the insured perils listed in the standard hull clauses included all the perils that one might expect to impact on a ship anyway, thus providing an 'uninterrupted continuum' of cover, so that the policy could be treated as attracting the same non-specific evidential threshold as an 'all risks' policy. Aikens J followed *The Salem* in holding that cover in respect of loss or damage 'caused by' enumerated perils requires proof of precisely that fact, so that the insured must identify the operative peril or

[9] ibid.

[10] *Brownsville Holdings Ltd v Adamjee Insurance Co Ltd (The Milasan)* [2000] 2 Lloyd's Rep 458 (Com Ct) [15].

perils. It may be noted, given that the London market does not offer 'all risks' hull cover, that this interpretation does not depend on the choice of alternative 'all risks' cover as posited by Mustill J.

If insurers are liable for losses proximately caused by an insured peril but not liable for losses not so caused, what happens where a loss is caused by the interaction of two perils one of which falls within the policy insuring clause and is therefore insured but one of which falls outside the terms of the policy, without being the subject of any express exclusion? The answer is that the insurer is liable. The insurer has undertaken to indemnify in relation to loss caused by any insured peril, and the loss in question has indeed been so caused. The policy does not require the insured peril to be the sole and exclusive cause. That the insured peril required the assistance of an uninsured peril to occasion the damage is contractually irrelevant. Moreover, the entirety of the loss forming a single casualty and that casualty being caused by an insured loss, nothing in the policy mandates any apportionment of the loss between the concurrent proximate causes.[11] The net effect is that while in the real world the loss has two causes which would need to be fully reflected in any investigation into the casualty, for the purposes of the insurance policy the cause that constitutes an uninsured peril effectively disappears because the contract terms do not afford it any relevance.[12] This is illustrated by the well-known case

[11] *Board of Trade v Hain Steamship Co Ltd* [1929] AC 534 (HL) 541.

[12] *Grill v General Iron Screw Collier Co* (1866) LR 1 CP 600, 611-12 (Willes J): 'a policy of insurance is an absolute contract to indemnify for loss by perils of the sea, and it is only necessary to see whether the loss comes within the terms of the contract and is caused by perils of the sea: the fact that the loss is partly caused by things not distinctly perils of the sea, does not prevent its coming within the contract.'

of *The Miss Jay Jay*[13] where the insured vessel sustained damage by reason of a combination of perils of the sea[14] and the vessel's own unseaworthy condition. The former was an insured peril, the latter was not mentioned by the policy. Neither peril sufficed on the facts to damage the vessel by itself, but the combination occasioned significant damage. The insurer was liable, the equal contribution of the uninsured cause not detracting from the contractual efficacy of

[13] *JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The Miss Jay Jay)* [1987] 1 Lloyd's Rep 32 (CA).

[14] The actual wording was 'external accidental means', but any difference from the traditional phrase 'perils of the sea' was immaterial.

the insured cause.[15] Likewise, in *Reischer v Borwick*,[16] the insuring clause was confined to 'the risk of collision [with another ship] and damage received in collision with any object, including ice.' A collision with a floating object damaged the insured ship including a breakage that allowed an inflow of water. Temporary repairs stopped the inflow but gave way in the course of towage to port for permanent repairs. The resumed inflow caused the ship to begin to sink. It was then run aground and abandoned. The Court of Appeal held the insurer liable. The only issue was whether the loss was correctly regarded as proximately caused by the collision. It was. The vessel was never out of the grip of the danger created by the breakage. That the

[15] An additional hurdle for the insurer lay in the fact that the circumstances in which unseaworthiness may be raised are limited. Under a voyage policy, it must be shown that the unseaworthiness was present at the commencement of the voyage (or stage thereof), while under a time policy it must be shown that the insured ship was sent to sea in an unseaworthy condition, that the insured knew of the ship's unseaworthiness, and that that unseaworthiness caused the loss in respect of which the insured subsequently seeks to claim: Marine Insurance Act 1906, s 39(1), (3), (5). This limitation of defences based on unseaworthiness represents a long-settled balance of risk between insured and insurer. To permit an insurer, despite the insured vessel having sustained loss caused by an insured peril (excluding therefore so-called 'debility' cases where the vessel's unseaworthy condition is the only proximate cause of the loss and the insurer is not liable simply because there is no loss caused by an insured risk), to resist a claim purely on the basis that unseaworthiness was a concurrent proximate cause, would be inconsistent with and undermine that balance of risk and the statutory provisions giving effect to it. To this effect at common law, see *Dudgeon v Pembroke* (1877) 2 App Cas 284 (HL).

[16] [1894] 2 QB 548 (CA).

subsequent events might themselves in the abstract or in the context of a different policy attract proximate cause status did not detract from the contractual efficacy of the collision. According to Lindley LJ:

> The sinking of this ship was proximately caused by the internal injuries produced by the collision, and by water reaching and getting through the injured parts whilst she was being towed to a place of repair. The sinking was due as much to one of these causes as to the other; each was as much a proximate cause of her sinking as the other, and it would, in my opinion, be contrary to good sense to hold that the damage by the sinking was not covered by this policy.[17]

III. EXCLUSIONS

Exclusion clauses come in various forms. Some general exclusions qualify the entirety of the cover conferred. Traditionally, a warranty that a policy was 'free from particular average' excluded liability for all partial losses. Today, the same result is produced not through an exclusion but by insuring on a 'total loss only' basis. More specific exclusions remove from cover loss or damage caused by certain specified perils that would otherwise fall within the

[17] ibid 551. See also the analysis of *Reischer v Borwick* by Lord Sumner in *Samuel (P) & Co Ltd v Dumas* [1924] AC 431 (HL) 468: 'The policy was against collision and damage received in collision only, and it could not be denied that the vessel was damaged in collision. It took two things to sink her: the hole made in collision and water flowing into it. They were both immediate and concurrent causes, and if either was within the policy, the assured recovered.' And see *Board of Trade v Hain Steamship Co Ltd* [1929] AC 534 (HL) 539.

scope of the policy's insuring clauses.[18] By way of example, the Institute Time Clauses Hulls (1/10/83) provide in cl 6.1.2 that the insurance covers loss of or damage to the insured vessel caused by 'explosion', but also by virtue of cl 25 that:

> In no case shall this insurance cover loss damage liability or expense arising from
>
> 25.1 the detonation of an explosive
>
> 25.2 any weapon of war
>
> and caused by any person acting maliciously or from a political motive.

Consequently, while loss or damage caused by explosion is prima facie insured, loss or damage caused by any explosion falling within cl 25 is then removed from the scope of cover.

The precise relationship between an exclusion and an insuring clause is, however, a matter of construction of the particular contractual provisions. An exclusion might, for example, carve a general source of loss out of the insured cover, but the exclusion might itself be subject to a derogation. That derogation may be stated in the exclusion itself. Thus, the war risks exclusion clauses that are a standard feature of the Institute clauses covering marine risks first exclude, inter alia, loss caused by a series of perils of deprivation of possession, namely 'capture seizure

[18] *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 (HL) 363 (Lord Dunedin, with respect to a policy on the SG form with an fcs clause (war risks exclusion) inserted): 'The policy, in time-honoured form, first specifies as the perils and adventures which the underwriters are content to bear, perils of the sea in general terms; and then comes a detailed enumeration of certain perils. Now when the fcs clause is added certain enumerated perils are cut out of the original insurance.'

arrest restraint and detainment', but then in the Institute Time Clauses Hulls and the Institute Cargo Clauses (A) expressly remove from the exclusion 'barratry and piracy'. Barratry and piracy being within the scope of the insuring clauses in those forms,[19] loss caused by a barratrous or piratical seizure remains covered.

The derogation from the exclusion may, alternatively, be found in the insuring clause, the insured perils to that extent prevailing over the express exclusion because that is the correct construction of the policy in question. Thus, where a named insured peril will tend to manifest itself in a form that is prima facie the subject of an express exclusion, affording priority to the exclusion deletes to that extent the supposedly insured peril from the insuring clause. The policy is, however, unlikely to be so construed. The parties are unlikely to have intended that the insured should pay the agreed premium for significant aspects of cover to be conferred in the insuring clause only then to be deleted by an exclusion. This is illustrated by *The Lydia Flag*,[20] in which the policy incorporated the Institute Time Clauses Hulls (1/10/83) and, therefore, included in the insuring clause loss caused by, inter alia, latent defects or negligence of repairers.[21] The policy in question, however, also included a suspensive condition (which

[19] In the Institute Time Clauses Hulls because they feature among the named perils, and under the Institute Cargo Clauses (A) because they constitute risks for the purposes of the 'all risks' insuring clause.

[20] *Martin Maritime Ltd v Provident Capital Indemnity Fund Ltd (The Lydia Flag)* [1998] 2 Lloyd's Rep 652 (Com Ct).

[21] As part of the Inchmaree clause, and subject therefore to the due diligence proviso that attaches to that clause.

excludes liability for losses arising from the time of breach until the time the breach is cured[22]) that the insured vessel was seaworthy at the inception of the policy and that the insured would exercise due diligence to maintain the vessel in a seaworthy condition throughout the duration of the insured risk. Given that a latent defect that causes a loss will generally render a vessel unseaworthy, and that negligence of repairers that results in loss of or damage to the vessel may well do the same, subordinating these aspects of the cover granted to the exclusion would involve a considerable and commercially implausible reduction in such cover. According to Moore-Bick J, therefore, 'the only sensible way in which to read these clauses together' was to regard the broad suspensive condition as subject to the terms of the insuring clause.[23] Where, therefore, the insured vessel was unseaworthy at the inception of the policy, the attachment of risk would be suspended until the unseaworthiness was cured unless the unseaworthiness was caused by a matter within the insuring clause, in which case the suspension would not apply and the ensuing loss would be covered.

In similar vein, a number of cases involve policies that cover the insured against negligence but contain an exclusion of liability drafted in language that would normally be construed as denoting a failure by the insured to act in a reasonable manner to prevent insured losses. On the basis that it would be 'repugnant to the commercial purpose of the contract' for the insured's negligence to deny cover under a policy designed to insure against negligence, the exclusion has again been subordinated to the insuring clause, this time by holding the language of the

[22] In the modern law, see Insurance Act 2015, s 10. Depending on the subject-matter of the clause or the circumstances of the casualty, the insurer may be precluded from invoking a breach: s 11.

[23] [1998] 2 Lloyd's Rep 652 (Com Ct) 656.

exclusion to require not just an objectively negligent but a subjectively reckless disregard of a possible danger.[24]

The situation just considered concerns a loss caused by one peril which falls within two policy provisions, namely the insuring clause and an exclusion. The position is different, however, where a loss is caused by the interaction of two perils, one of which falls within the policy insuring clause and is therefore insured but one of which falls within an express contractual exclusion. Of course, there may be disputes about the proper construction of the exclusion,[25] or indeed whether a particular policy term creates an exclusion,[26] but a term that explicitly carves out of the policy certain losses caused by a specified peril affords the peril so excluded not just contractual relevance but, within the contractual scheme, priority over the insuring clause. In *Cory (John) & Sons v Burr*,[27] smuggling on the part of the master of the insured ship led to seizure by customs authorities. The smuggling constituted the insured peril of barratry

[24] *Fraser v Furman (BN) (Productions) Ltd* [1967] 1 WLR 898 (CA) 905-6 (Diplock LJ), following *Woolfall & Rimmer Ltd v Moyle* [1942] 1 KB 66 (CA) 76-7. See also *Lane (W&J) v Spratt* [1970] 2 QB 480 (Com Ct); *Aluminium Wire & Cable Co Ltd v Allstate Insurance Co Ltd* [1985] 2 Lloyd's Rep 280 (QB); *Legal & General Insurance Australia Ltd v Eather* (1986) 6 NSWLR 390; *Cee Bee Marine Ltd v Lombard Insurance Co Ltd* [1990] 2 NZLR 1 (CA); *Sofi v Prudential Assurance Co Ltd* [1993] 2 Lloyd's Rep 559 (CA) 564.

[25] See, for example, *Tektrol Ltd v International Insurance Co of Hanover Ltd* [2005] EWCA Civ 845, [2005] 2 Lloyd's Rep 701.

[26] See, for example, *IF P&C Insurance Ltd (Publ) v Silversea Cruises Ltd* [2004] EWCA Civ 769, [2004] Lloyd's Rep IR 696 [97]-[104].

[27] (1883) 8 App Cas 393 (HL).

while the policy provided that it was 'warranted free from capture and seizure', meaning that such perils were excluded. The House of Lords held that the policy wording protected the insurer. According to Lord Selborne, 'It is quite manifest that the object of this warranty is and must be to except such losses otherwise covered by the policy, otherwise coming within the express terms of the policy'.[28] Likewise, in *Wayne Tank & Pump Co Ltd v Employers Liability Assurance Corp Ltd*,[29] the claimant designed and installed equipment that caused a fire and sought indemnification under a liability policy in respect of the resulting liability. The fire was caused by employee negligence and by unsuitable material in the equipment. Liability arising from the former was covered by the policy while liability arising from the latter was caught by an exclusion. On the basis that both causes were proximate in efficacy, the insurers were held not liable. According to Lord Denning MR, in respect of the excluded loss the insurers 'have stipulated for freedom' and 'the only way of giving effect to it is by exempting them altogether'.[30]

[28] ibid 397.

[29] [1974] QB 57 (CA).

[30] At 67. See also *Board of Trade v Hain Steamship Co Ltd* [1929] AC 534 (HL) 541 (insurers under hull policy on marine risks with war risks exclusion not liable for collision occasioned by marine risk and by war risk). And see *Kiriacoulis Lines SA v Compagnie d'Assurances Maritimes Aeriennes et Terrestres (The Demetra K)* [2002] EWCA Civ 1070, [2002] 2 Lloyd's Rep 581 at [18]; *Tektrol Ltd v International Insurance Co of Hanover Ltd* [2004] EWHC 2473 (Comm), [2005] 1 All ER (Comm) 132; reversed on other grounds [2005] EWCA Civ 845, [2005] 2 Lloyd's Rep 701.

Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd,[31] the leading case on the doctrine of proximate cause, concerned a hull policy that covered perils of the sea but excluded war risks. Having been torpedoed by a submarine, the insured vessel managed to reach its port of destination where it was required to anchor in a location where its weakened structure was exposed to significant strain by repeated grounding and refloating with the ebb and flow of the tide until its structure gave way and the vessel was rendered a total loss. The insured shipowner sought to avoid the exclusion by arguing that on the facts of the case it had nothing upon which to bite. It excluded only losses proximately caused by a war risk and the torpedo was not the proximate cause of the loss since it merely created the opportunity for the perils of the sea to destroy the vessel, proximity of causation being determined by immediacy in time to the loss. The House of Lords held, however, that proximity is determined by effectiveness in producing the loss and rejected the argument that the torpedo lacked proximate cause status since on the facts the vessel was doomed from the moment of impact of the torpedo. An unsuccessful attempt to save a stricken vessel did not break the chain of causation between the peril that triggered the crisis and the ultimate loss. Given the priority afforded to the exclusion over the insuring clause, the subsequent tidal impact on the vessel lacked contractual relevance. In a later case, moreover, Lord Sumner offered the following analysis of *Leyland Shipping*:[32]

> [T]he pressure of the water overcame the resistance of the bulkhead and the ship filled and sank, but it was the explosion of the torpedo which admitted that pressure to the bulkhead. Thus there were two concurrent causes proximately operating - namely, the

[31] [1918] AC 350 (HL).

[32] *Samuel (P) & Co Ltd v Dumas* [1924] AC 431 (HL) 467-68.

> opening of the ship's side and the pressure of the sea - and the policy, being free of the consequences of the former, it was free of this loss, though, if the insurance had been against perils of the sea and no more, the loss would have fallen within it.

A final example of the significance of a peril being expressly excluded as opposed to simply not insured is provided by *The Demetra K*,[33] which concerned a claim under a hull policy for damage by fire that, it was assumed for the purposes of the litigation, had been started deliberately but not by or at the behest of the insured owners. The policy incorporated the Institute Time Clauses Hull (1/10/83). Fire was therefore covered as one of the standard insured perils, and the standard exclusion of malicious acts did not apply on the facts as it is confined to loss arising from the detonation of an explosive or any weapon of war. Consequently, the malicious act of starting the fire, although factually a concurrent proximate cause, was contractually irrelevant.[34] The insurers claimed for rectification of the policy so as to include a clause that expressly excluded acts of 'vandalism and/or sabotage and/or malicious mischief'. Had rectification been granted, that clause would have afforded contractual relevance and, indeed, priority to the excluded malicious act. On the facts, the claim failed.

[33] *Kiriacoulis Lines SA v Compagnie d'Assurances Maritime Aeriennes et Terrestres (The Demetra K)* [2002] EWCA Civ 1070, [2002] 2 Lloyd's Rep 581.

[34] This was the analysis of the Court of Appeal, but it involves separating the malicious act of starting the fire from the fire so started. It may be more precise to regard the loss as caused by a single proximate cause that qualified as both the insured peril of fire and as a malicious act, although nothing turned on this difference in analysis.

Consequently, if the facts of *The Miss Jay Jay*[35] were replicated but the policy contained an express unseaworthiness exclusion, the result would be reversed in favour of the insurer. Instead of a case of simply giving effect to the insuring clause in the absence of any competing contractual provision, there would be a priority contest between the insuring clause and an express exclusion, as the second cause operative in fact (the unseaworthy condition of the insured vessel) would now have contractual relevance through the exclusion. If the policy in *The Lydia Flag*[36] were replicated but on the facts the loss was caused by a combination of a latent defect and some other unseaworthiness outside the insuring clause but within the exclusion, again the result would be reversed in favour of the insurer. This time the exclusion would be relevant as having a factual cause on which to bite.

With respect to burden of proof, the insured must prove the loss to fall outside the terms of a general exclusion that qualifies the entirety of cover; otherwise the insured will fail to establish that in principle the loss falls within the terms of the policy. In contrast, the burden of proof in relation to exclusions that carve out part of the cover otherwise provided by the policy as falling within the terms of the insuring clauses falls on the insurer.[37] In practice, however, since exclusions contradict insuring clauses, the insured in meeting its burden of proof in relation to an insured peril may engage with one or more policy exclusions. For example, in advancing a

[35] *JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The Miss Jay Jay)* [1987] 1 Lloyd's Rep 32 (CA). See above, text to n 13.

[36] *Martin Maritime Ltd v Provident Capital Indemnity Fund Ltd (The Lydia Flag)* [1998] 2 Lloyd's Rep 652 (Com Ct). See above, text to n 20.

[37] *Green v Brown* (1744) 2 Str 1199, 93 ER 1126; *Munro, Brice & Co v War Risks Association Ltd* [1918] 2 KB 78.

claim for a loss caused by an explosion, the insured might adduce evidence as to how the explosion occurred that negates the application of the malicious acts exclusion. Moreover, the more complex the interrelationship between insured peril and exclusion, the more difficult it will be to prove an insured loss without negating the exclusion. Thus, proof of loss of cargo by reason of piratical capture under the Institute Cargo Clauses (A) will obviously involve establishing that the loss falls within the derogation from the exclusion of perils of deprivation of possession, and therefore that the exclusion is inapplicable.

IV. EXCEPTIONS

Exceptions are different from exclusions. This has previously received little attention.[38] Rather than detracting from the cover prima facie offered by the insuring clauses, exceptions serve instead to articulate restrictions on the scope of cover that are in fact inherent in the terms of insuring clauses. They function not as policy carve-outs but as aids to understanding what the insuring clauses do and do not cover in the first place.

In the Marine Insurance Act, s 55, having articulated in subs (1) a basic proposition of cover in respect only of loss proximately caused by insured perils, continues in subs (2) to state what the draftsman considered 'the more important deductions from the general rule' of subs (1).[39]

[38] Although it has been acknowledged: eg, *Arnould, Law of Marine Insurance and Average*, 19th edn (London: Sweet & Maxwell, 2018) J Gilman et al, para 22-01 (although employing the term 'exception' in the sense of exclusion as used in this article).

[39] Sir M Chalmers and D Owen, *The Marine Insurance Act 1906*, 2nd edn (London: Butterworth & Co, 1913) p 82.

This nature of subs (2), as providing specific examples, generally subject to contrary intention, of the broader proposition stated in subs (1) is indicated in the statute by the fact that subs (2) opens with the words 'In particular'.[40]

By addressing specific aspects of cover, s 55(2), unusually for an Act of Parliament, is articulating not substantive rules of law but, generally default,[41] propositions as to how a commercial contract is to be construed.[42] 'Marine insurance' is itself defined by the 1906 Act as insurance against 'marine losses, that is to say the losses incident to marine adventure'.[43] A 'marine adventure' is then said to arise in relation to a ship or goods by exposure to 'maritime perils',[44] which are then stated in s 3 of the Act to be

> the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seisures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy.

[40] *HIH Casualty & General Insurance Ltd v Waterwell Shipping Inc* [1998] NSWSC 436, (1998) 43 NSWLR 601, 612.

[41] With the exception of the first proposition in s 55(2)(a) that an insurer is not liable for loss attributable to the insured's wilful misconduct, which reflects public policy.

[42] *Soya GmbH Mainz Kommanditgesellschaft v White* [1983] 1 Lloyd's Rep 122 (HL) 125.

[43] Marine Insurance Act 1906, s 1.

[44] Marine Insurance Act 1906, s 3(2)(a).

This language reflects the marine insurance market of the time, in which marine policies were written on the basis of the traditional Lloyd's SG form, supplemented where appropriate by additional market clauses,[45] the list of perils in s 3 being derived from and substantially replicating the list of perils enumerated in the SG policy. Chalmers described this policy as 'time-honoured', albeit afflicted by 'crabbed and obscure language',[46] and stated that 'all British insurance law has been developed through cases arising on the [SG] policy.'[47] Section 55(2) then amplifies s 3, identifying a number of perils that are not covered simply because they do not fall within the traditional scope of a marine policy as delineated by the concept of 'maritime perils'.[48] To the extent that the subsection articulates a set of default propositions, it impedes neither contradictory developments in the extent of standard cover nor contradictory offerings of bespoke cover.

A simple illustration is provided by machinery damage cover. In *The Inchmaree*,[49] it was held that the breakage of a piece of ship machinery while the ship was at sea was not covered under

[45] The first 'running down clause' dates from 1884, while, as noted above, the first set of Institute clauses, for time policies on ships, was promulgated in 1888.

[46] Sir M Chalmers and D Owen, *The Marine Insurance Act 1906*, 2nd edn (London: Butterworth & Co, 1913) p 3.

[47] ibid 150.

[48] See especially *Taylor v Dunbar* (1869) LR 4 CP 206, discussed below.

[49] *Thames & Mersey Marine Insurance Co Ltd v Hamilton, Fraser & Co (The Inchmaree)* (1887) 12 App Cas 484 (HL).

the phrase 'perils of the seas', nor by virtue of cover of perils 'of the like kind',[50] because of the absence of the requisite maritime connection. Machinery can break anywhere; that a particular piece happens to break at sea does not afford the breakage a maritime nature. Consequently, s 55(2)(c) includes in its list of losses presumptively not covered 'any injury to machinery not proximately caused by maritime perils'. This is not an example of loss that would in principle be covered but for an exclusion; the insurer is not liable simply because the loss does not fall within the traditional scope of cover in the first place. That, however, is subject to contrary intention. And the decision in *The Inchmaree* prompted the inclusion within hull policies of the standard extension of cover, retained in modern market wordings, to consequential damage to the insured vessel caused by bursting of boilers, breakage of shafts, and latent defects.

The same approach applies to 'ordinary wear and tear, ordinary leakage and breakage' as stated by s 55(2)(c) as presumptively not covered or the similar 'ordinary leakage, ordinary loss in weight or volume, or ordinary wear and tear of the subject-matter insured' not covered under the Institute cargo clauses.[51] The concept of 'risk' as inherent in the 'all risks' insuring clause of the Institute Cargo Clauses (A), or 'fortuity' in the context of perils of the seas,[52] denotes a

[50] The literal wording of the SG policy extended to 'all other perils, losses, and misfortunes that have or shall have come to the hurt, detriment, or damage of the said goods, and merchandises, and ship', but its scope was limited by interpretation *eiusdem generis* to the preceding list of maritime perils, reflected in the 'of the like kind' phraseology of s 3. And see Marine Insurance Act 1906, sch 1, r 12.

[51] Institute Cargo Clauses (A), (B), (C) (1/1/09), cl 4.2.

[52] Marine Insurance Act 1906, sch 1, r 7.

'casualty'[53] and not the natural attrition to be expected from the exposure of the insured property to the maritime environment necessarily experienced in the course of an insured adventure.[54] This reflects commercial sense. An insurer must assume that such loss, while not inevitable, will occur; were the policy to cover such loss, the only sensible financial response would be to increase the premium by an amount equivalent to the indemnity such loss, it must be assumed, will generate. The logical interpretation, subject of course to contrary intention, must reflect this reality. Ordinary wear and tear could be regarded as falling within the concept of risk or fortuity on the basis that it is not inevitable, with the policy then read as presumptively subject to an implied exclusion. Instead, and perhaps more naturally, the standard insuring clauses are construed as not covering such loss in the first place; the loss is excepted from cover so there is nothing to exclude.

This nature of the presumptively uninsured risks in s 55(2) as policy exceptions rather than exclusions is further illustrated by the peril of inherent vice as analysed by the Supreme Court in *The Cendor MOPU*.[55] The insured oil rig sustained significant damage while being transported on a barge from the United States to Malaysia, with an inspection stop in South Africa, insured under a policy incorporating the Institute Cargo Clauses (A). The rig consisted

[53] *Thomas Wilson, Sons & Co v Owners of the Cargo per the Xantho (The Xantho)* (1887) 12 App Cas 503 (HL) 509 (Lord Herschell).

[54] Marine Insurance Act 1906, sch 1, r 7: 'The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.'

[55] *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad (The Cendor MOPU)* [2011] UKSC 5, [2011] 1 Lloyd's Rep 560.

of a platform and three cylindrical steel legs with a height of 312 feet, a diameter of 12 feet, and a weight of 404 tons each. Each leg contained 45 sets of rectangular slots (pinholes) at regular, six feet intervals, allowing for the height of the platform to be adjusted by a jacking system which inserted steel pins into the appropriate set of pinholes. The rig was transported with the platform lowered to the base of the legs so that they projected some 300 feet into the air. In the course of the voyage across the Atlantic, the pitching of the barge necessarily caused the legs to flex, exerting stress that drained the fatigue strength of the legs and led to fatigue cracks, initially at the points of greatest weakness, namely the corners of the pinholes. By the time the rig reached South Africa, the legs were weakened by 'widespread and severe cracking' between the heights of six and 30 feet.[56] This extensive cracking still left intact a considerable amount of extremely strong steel such that a complete fracture required the impact of a wave of sufficient force at the right angle (termed a 'leg-breaking wave').[57] Not long after embarking on the second leg of the voyage from South Africa to Malaysia, such a wave hit one of the legs, which broke off completely at a height of 30 feet, further accentuating the stresses on the other legs, which also broke off in due course. The insured contended that it was entitled to recover for a loss caused by a 'risk', namely a peril of the sea in the form of the leg-breaking wave, while the insurer invoked the defence of inherent vice as stated in s 55(2)(c) of the Marine Insurance Act and reiterated in cl 4.4 of the Institute Cargo Clauses (A).

In terms of the discussion already in this article, the insured would win were a peril of the sea, being a risk within the 'all risks' insuring clause, found to be the sole proximate cause of the

[56] [2009] EWHC 637 (Comm), [2009] 2 Lloyd's Rep 72 at [47]. Over 200 cracks had developed, each of between 100 and 200 mm in length.

[57] ibid [48]-[49].

loss, or at least the sole proximate cause of contractual relevance. The insurer conversely would prevail were either inherent vice the sole proximate cause of the loss, or alternatively both a peril of the sea and inherent vice were proximate causes and contractual priority afforded to inherent vice as an excluded peril.

If one asked as a proposition of fact what caused the casualty, the answer would have to be a combination of a peril of the sea and the inadequate fatigue strength of the rig for the voyage, which manifested itself in the fatigue cracking. Factually, the case is indistinguishable from *The Miss Jay Jay*: in each case, the insured vessel would have survived but for the impact of the sea peril, yet the sea peril could not have caused the damage absent the pre-existing weakness of the vessel. And, indeed, the Supreme Court in *The Cendor MOPU* held in favour of the insured. The legal analysis, however, is slightly different.

Critically, the Supreme Court approved the definition of inherent vice offered by Lord Diplock in *Soya v White*[58] as 'the risk of deterioration of the goods shipped as a result of their natural behaviour in the ordinary course of the contemplated voyage without the intervention of any fortuitous external accident or casualty.' The consequence of the closing phrase is that the involvement (in the sense of constituting a proximate cause) of any external fortuity precludes a finding of inherent vice. It follows that it is impossible for an insured risk and inherent vice to be concurrent proximate causes in the terms of an insurance policy: the presence of an insured risk excludes inherent vice, while a finding of inherent vice means that no insured risk constituted a proximate cause of the loss. Inherent vice cannot, therefore, constitute the subject-matter of an exclusion that can attract contractual priority over a concurrently operative insured

[58] *Soya GmbH Mainz KG v White* [1983] 1 Lloyd's Rep 122 (HL) 126.

peril; rather, it constitutes an exception, clarifying an aspect of what, subject to contrary stipulation, is not covered by a marine policy.[59] In the real world of mobile oil rigs, the condition of the Cendor MOPU was the overwhelming reason for the casualty and would have dominated any investigation designed to establish a definitive explanation with a view to preventing such incidents in the future. In the contractual world of the insurance policy, however, the condition of the rig could have relevance only through the concept of inherent vice, which as a matter of legal principle can exist only in a pure form, unadulterated by any external risk. Accordingly, the status of the leg-breaking wave as a proximate cause of the loss condemned the condition of the rig to contractual irrelevance.

That inherent vice cannot co-exist as a concurrent proximate cause with an insured risk flows, however, from the definition of inherent vice and not from its status as an exception. There is no reason in principle why an excepted peril cannot constitute a concurrent proximate cause, which raises the question of how a policy is to be read in such circumstances. The answer is that the insured risk prevails. Section 55(2) does not of itself generate an overriding defence. Its sole function is to clarify the scope of cover under a marine policy in traditional form. There is no difference between, on the one hand, the situation where a loss is caused by an insured risk and a risk that s 55(2) clarifies is not within the scope of the insuring clause and, on the other hand, the situation exemplified by *The Miss Jay Jay* where a loss is caused by an insured risk and a risk in respect of which the policy is silent. In neither case does the policy contain the express contractual stipulation for immunity that is critical to the priority afforded to exclusions under the approach adopted in cases such as *Wayne Tank & Pump*. In the Australian

[59] *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad (The Cendor MOPU)* [2011] UKSC 5, [2011] 1 Lloyd's Rep 560 [134].

case of *HIH Casualty & General Insurance Ltd v Waterwell Shipping Inc*,[60] the insured vessel was lost because of a combination of the insured peril of negligence of the master officers and crew (in leaving the insured fishing vessel unmanned in port without ensuring that sea suction valves were shut to prevent the ingress of sea water that was required when the vessel was working for purposes such as engine cooling) and also ordinary wear and tear (in the form of corrosion to the water circulation system, part of which failed and allowed sea water to enter the vessel, leading to its sinking). The policy did not mention ordinary wear and tear while the relevant provision of the Australian Marine Insurance Act[61] mirrors the 1906 Act. The risk of such corrosion being reasonably foreseeable, the New South Wales Court of Appeal considered the insurer liable on the basis that the negligent failure to guard against it was the proximate cause of the loss. Obiter, however, the Court also considered that if the loss was correctly to be analysed as the result of two concurrent proximate causes, the insurer remained liable, following and applying *The Miss Jay Jay*: wear and tear was not excluded, but 'was simply outside the cover provided'.[62]

The denial of cover, albeit this time not subject to contrary intention, in relation to 'any loss attributable to the wilful misconduct of the assured' under s 55(2)(a) of the Marine Insurance Act responds to the same exception analysis. Two ideas combine in the denial.[63] First, to permit recovery may result in encouraging the deliberate or reckless endangering of life and the

[60] [1998] NSWSC 436, (1998) 43 NSWLR 601.

[61] Marine Insurance Act 1909, s 61(2)(c).

[62] [1998] NSWSC 436, (1998) 43 NSWLR 601, 613 (Sheller JA).

[63] *Beresford v Royal Insurance Co Ltd* [1938] AC 586 (HL); *Porter v Zurich Insurance Co* [2009] EWHC 376 (QB), [2009] 2 All ER (Comm) 658.

property of others, and in modern times one would add the environment. It would be contrary to public policy to encourage an insured shipowner to sacrifice, or at least jeopardise, the wellbeing and interests of others by scuttling its own ship to profit from an insurance claim. This could be achieved by an exclusion. Secondly however, as a matter of interpretation, not only the concept of 'risk' when used in an insuring clause but also nominate perils generally do not include instances when deliberately or recklessly procured by the insured itself. Thus, as a matter of interpretation, wilful misconduct of the insured denies a loss the fortuity necessary to constitute a risk for the purposes of 'all risks' cover,[64] or the fortuity required as a matter of the definition of a peril of the sea,[65] and also constitutes an innate restriction on perils that are not defined in terms of fortuity, such as fire, so that they otherwise embrace deliberately procured instances.[66] No exclusion is, therefore, necessary as there is no cover in the first place.

To some extent, a similar analysis applies with respect to the exception under s 55(2)(c) of 'loss proximately caused by rats or vermin'. In the context of the Lloyd's SG policy, insurers were not liable for damage caused by rats either eating cargo or gnawing at the timber of ships because such rodent activity lacked the necessary maritime nature to qualify as the only

[64] *British & Foreign Marine Insurance Co Ltd v Gaunt* [1921] 2 AC 41 (HL) 57.

[65] *Trinder v Thames & Mersey Marine Insurance Co* [1898] 2 QB 114 (CA) 127-28 (Collins LJ): wilfulness 'takes from the catastrophe the accidental character which is essential to constitute a peril of the sea'.

[66] *Beresford v Royal Insurance Co Ltd* [1938] AC 586 (HL) 595; *Charlton v Fisher* [2001] EWCA Civ 112, [2002] QB 578 [51].

candidate insured peril, namely perils of the sea.[67] Where, however, rats gnawed a hole in a ship's pipe resulting in an inflow of water that damaged the cargo, the water supplied the maritime connection and the activity of the rats the requisite fortuity to give rise to a peril of the sea.[68] Under modern policies, this analysis remains valid with respect to hull policies where the insuring clause retains the concept of perils of the sea. Cargo, however, will generally be insured under a policy incorporating the Institute Cargo Clauses (A), and therefore against 'all risks' except for those subsequently stated in the Clauses as not covered. No subsequent provision in the Clauses denies cover in relation to loss or damage caused by rats or vermin. Consequently, since the objection to cover under the SG Policy was the lack of maritime connection to qualify as a peril of the sea rather than the absence of fortuity to deny the occurrence of a risk of any sort, the alteration in wording from the SG policy to the modern

[67] *Laveroni v Drury* (1852) 8 Ex 166, 171 (Pollock CB): a carrier's perils of the sea defence 'does not cover damage by rats, which is a kind of destruction not peculiar to the sea or navigation, or arising directly from it, but one to which such a commodity as a cheese is equally liable in a warehouse on land as in a ship at sea.' See also *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518 (HL) 525 (Lord Watson): 'When a cargo of rice is directly injured by rats, or by the crew of the vessel, the sea has no share in producing the damage, which in that case, is wholly due to a risk not peculiar to the sea, but incidental to the keeping of that class of goods, whether on shore or on board of a voyaging ship.'

[68] *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518 (HL) esp 529-30. Although the entry of water through a hole gnawed in the wooden bottom of a vessel unprotected by copper sheathing constituted ordinary wear and tear (524), reflecting the susceptibilities of vessels at the time.

Institute Cargo Clauses (A) has the effect in relation to rats and vermin of furnishing contrary provision to override the presumption against absence of cover stated by s 55(2)(c).

The incidence of the burden of proof in relation to exceptions will vary according to the insured peril and the exception in question. The definition of inherent vice means that proof by the insured of a peril within the insuring clauses acting as at least a proximate cause of the loss will negate any possibility of inherent vice. Moreover, the definition of perils of the sea as requiring fortuity serves to exclude the ordinary action of winds and waves;[69] proof of a peril of the sea must therefore deny ordinary wear and tear. As a general proposition, however, since exceptions do not contradict insuring clauses, the insured in satisfying its burden of proof in relation to the insuring clauses need not in principle engage with policy exceptions, although the evidence it adduces may in fact do so.

V. DELAY

The treatment of delay in the Marine Insurance Act and the Institute cargo clauses both illustrates aspects of the previous discussion and also exhibits difficulties created by the history of the subject.

Section 55(2)(b) of the Marine Insurance Act provides that, subject to contrary intention, 'the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against.' The 1982 revision of the Institute cargo clauses duly reiterates that the insurance does not cover 'loss damage or expense proximately caused

[69] Marine Insurance Act 1906, sch 1, r 7.

by delay, even though the delay be caused by a risk insured against' with the exception of expenses payable by reason of the policy cover in relation to general average and salvage charges. The 2009 revision of the Institute cargo clauses retains wording that is identical except for removal of the adverb 'proximately' qualifying the verb 'caused', a change prompted by the unhelpfulness of the adverb in conveying the extent of cover to insureds rather than any intention to alter the substance of the bargain. This limitation on cover, which requires an extended discussion, reflects market understanding of the scope of commonly insured perils and originates to a significant extent in the question of liability of insurers for the mortality of live cargoes, notably slaves in the era of the trans-Atlantic slave trade.

A. The Slave Trade Legislation

The first regulation of the trans-Atlantic slave trade introduced into English law, the Slave Trade Act 1788[70] was designed to reduce excessive levels of mortality and suffering of slaves being transported from Africa on British ships, generally to the Caribbean on the infamous 'Middle Passage'.[71] It introduced restrictions on the number of slaves that could be carried by reference to the size of the slave ship and sought to prevent cargo insurance acting as a disincentive to reasonable care being taken for the health of the slaves. Section 12 of the 1788

[70] 28 Geo III c 54 (also known as Dolben's Act).

[71] So called because a typical English slave ship voyage would comprise three 'triangular' legs: first, from England to the west coast of Africa with a cargo of goods, such as guns, to be traded for slaves; secondly, from Africa to the Caribbean with a cargo of slaves; thirdly, from the Caribbean back to England with a cargo of produce from the plantations, such as sugar, molasses or tobacco, purchased with the proceeds of selling the slaves.

Act rendered it unlawful for the owner of a slave ship 'to insure any Cargo of Slaves, or any Part thereof, on board the same, against any Loss or Damage, save and except the Perils of the Sea, Piracy, Insurrection, or Capture by the King's Enemies, Barratry of the Master and Crew, and Destruction by Fire', with any offending policy being declared null and void for all purposes. The Act therefore denied the protection of insurance against death by natural causes, or as a result of maltreatment by the master or crew or of lack of food or water. In consequence, in the event of a failure to provision a slave ship properly with adequate food and water for the voyage, including a sensible allowance for delays in the prosecution of the voyage, the slave owner would not be entitled to recover under a cargo policy for slave mortality resulting from such inadequate provision.

The precise technical effect of the legislation nevertheless required clarification. In practice, merchants continued to use the standard form Lloyd's SG policy for the insurance of slaves notwithstanding its wider range of covered perils than those listed by the 1788 Act, believing that the Act was directed not to the form of any policy but to the permissible recoverable losses where the relevant insured cargo consisted of slaves. Subsequent Slave Trade Acts, beginning with the 1793 Act, therefore clarified that insurance of slaves was indeed not rendered void on account of its form but instead that 'no loss or damage shall be recoverable on account of the mortality of slaves by natural death or ill treatment, or against loss by throwing overboard of slaves on any account whatsoever'.[72]

B. Anterior Approach To Insurance Of Slaves

[72] Slave Trade Act 1793 (33 Geo III c 73), s 10; Slave Trade Act 1794 (34 Geo III c 80), s 10; Slave Trade Act 1795 (35 Geo III c 90), s 1; Slave Trade Act 1797 (33 Geo III c 104), s 1.

The Slave Trade Acts in part confirmed the prior approach to the insurance of slaves, at least under general cargo policies, while also imposing certain restrictions. A distinction between death by natural causes and death by an insurable casualty appears to be long-standing. According to the marine insurance customs that evolved in sixteenth century London and were stated in the 1570s, albeit as a draft seemingly never completed, in *A Booke of Orders of Assurances within the Royall Exchange* (also known as the London Code),[73] insurance policies covered a list of perils similar to that subsequently incorporated in the SG policy. In respect of slaves (or cattle), insurers were not liable should they escape or die by sickness but would be liable should they be drowned in a shipwreck.[74] Two centuries later, Lord Mansfield presided over both the trial and the application for a retrial in the infamous case of *Gregson v Gilbert*,[75] in which a claim was brought in relation to the throwing overboard of 132 slaves. In the course of argument on the application for a retrial, Lord Mansfield stated:

[73] See generally G Rossi, *Insurance in Elizabethan England: The London Code* (Cambridge: Cambridge University Press, 2016). Versions of the *Booke of Orders* are found notably in British Library Manuscripts Harleian 5103 and Additional 48023, reproduced ibid, Appendix I.

[74] Harleian 5103, art 10; Additional 48023, art 11.

[75] (1783) 3 Dougl 232, 99 ER 629, discussed further below.

> Since the trial I was informed if they die a Natural Death they do not pay but in an Engagement if they are attacked and the Slaves are killed they will be paid for them as much as for Damages done for goods &c …[76]

The same distinction, he had been told, applied equally to horses.[77]

The rationale would appear to be a combination of ordinary wear and tear, and also inherent vice: a certain mortality rate had to be expected in slave cargoes,[78] and insurers could not be expected to guarantee that the slaves possessed the health and strength, both physical and

[76] 'Proceedings in the Court of King's Bench on a Motion for a New Trial', National Maritime Museum Manuscripts REC/19, 20-21, reproduced in A Lyall, *Granville Sharp's Cases on Slavery* (Oxford: Hart Publishing, 2017) 243-290, 255.

[77] Of course, the insurers' liability would ultimately depend on the terms of the particular policy. B Drew, *The London Assurance: A Second Chronicle* (Plaistow: Curwen Press, 1949) 37, records policies narrowing the cover granted, declaring themselves 'free from the death of Slaves either Natural, Violent, or Voluntary', or, simply, excluding all loss or all averages 'arising by Death and Insurrection of Negroes'.

[78] In a speech in Parliament in 1789 opening a debate on abolition of the slave trade, William Wilberforce stated: 'It will be found, upon an average of all the ships of which evidence has been given at the privy council, that exclusive of those who perish before they sail, not less than 12½ per cent perish in the passage.' See Cobbett, *The Parliamentary History of England, from The Earliest Period to The Year 1803* (London: Hansard, 1816) vol 28 (1789-1791) col 47.

mental, to survive the rigours of the voyage.[79] It is noteworthy that the relevant provision in the *Booke of Orders* commences by denying liability in relation to leakage, depreciation, wastage, or loss of quantity of goods that otherwise arrive safely as opposed to goods that are lost or damaged in a shipwreck, the position in relation to slaves then being stated with the introductory words 'And likewise'. Slaves were simply perishable goods, innately susceptible to death in transit; insurers' liability was confined to loss caused by external accident.

A similar result was achieved in civil law jurisdictions, albeit sometimes by different reasoning. At that time, life insurance was widely prohibited, reflecting[80] concerns of impiety,[81] objectionable gambling,[82] fraud,[83] and even murderous temptation.[84] Jurisdictions varied,

[79] M Lobban, 'Slavery, Insurance and the Law' (2007) 28 J Leg Hist 319, 325; JP Van Niekerk, *The Development of the Principles of Insurance Law in the Netherlands 1500-1800* (Cape Town: Juta & Co, 1998) 434.

[80] See G Clark, *Betting on Lives: The Culture of Life Insurance in England, 1695-1775* (Manchester: Manchester University Press, 1999) 15; T Armstrong, *The Logic of Slavery: Debt, Technology, and Pain in American Literature* (Cambridge: Cambridge University Press, 2012) 14; T Jencks, 'Life Insurance in the United States' (1843) Hunt's Merchants' Magazine & Comm Rev 109, 111-12; V Zelizer, 'Human Values and the Market: The Case of Life Insurance and Death in 19th-Century America' (1978) 84 Am J Sociol 591, 597-98.

[81] In that matters of life and death fall exclusively within the divine prerogative.

[82] By taking out life insurance policies on the seriously ill or those on trial for a capital offence.

[83] By misrepresenting the life insured as younger and healthier than was the truth.

[84] And also Roman law's bequest of the impossibility of valuing the life of a free man. English law harboured no theological objection to life insurance and responded to the other concerns

however, as to whether slaves were conceptualised as human. Those that regarded slaves as human even while treating them as objects of commerce, such as France, had to resort to artificial reasoning. The French Ordonnance de la marine of 1681 prohibited life insurance but then, by way of exception, permitted the insurance of ransom payments on the life redeemed against the recapture or death by other than natural causes of the ransomed person during their return home.[85] In his *Nouveau commentaire* on the Ordonnance, Valin records that this dispensation was applied by analogy to slaves shipped from Guinea to the French colonies.[86] In effect, a slave having been purchased and in transit to a colony was likened to a captive having been ransomed and on a journey home. Of such insurance of slaves, Valin comments,[87] as included in translation by Weskett in his 1781 *Digest*:[88]

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through the doctrine of insurable interest (see the Life Assurance Act 1774, 14 Geo III c 48), but conceived of slaves purely as property, and therefore presenting no problem of valuation.

[85] Book III, Title VI, Arts X, XI. The Ordonnance was based in significant measure on the *Guidon de la mer*, published the previous century, precise year unknown. In relation to the specific provisions of the Ordonnance referenced, see the *Guidon*, chap XVI, arts II-V.

[86] R-J Valin, *Nouveau commentaire sur l'Ordonnance de la marine du mois d'août 1681* (La Rochelle: Legier, 1760) Livre III, Titre VI, Art XI (vol 2, 55). Pothier, however, disagreed, contending that the prohibition on life insurance was inapplicable to slaves as items of commerce and susceptible to valuation: *Traité du Contrat d'Assurance* (Marseilles: Roux-Rambert, 1810) J-J Estrangin ed, ch I, sect II, art I, § II (para 28).

[87] ibid.

[88] J Weskett, *A Complete Digest of the Theory, Laws and Practice of Insurance* (London: Frys, Couchman & Collier, 1781) 525 ('Slaves').

> The insurer takes upon him the risques of the loss, capture, and death of slaves, or any other unavoidable accident to them: but natural death is always understood to be excepted: - by natural death is meant, not only when it happens by disease or sickness, but also when the captive destroys himself through despair, which often happens: but when slaves are killed, or thrown into the sea in order to quell an insurrection on their part, then the insurers must answer.[89]

Other civil law jurisdictions, however, shared English law's absence of scruples about regarding slaves as chattels and employed cargo insurance without hesitation, but again excluding natural death albeit as a matter of contract.[90]

Thus, prior to the Slave Trade Acts, a 'natural death' was not covered whether as a matter of the contractual interpretation of general cargo policies or as a matter of public policy.[91] The

[89] On the insurer's absence of liability for natural death, whether in relation to slaves or animals, see also RJ Pothier, *Traité du Contrat d'Assurance* (Marseilles: Roux-Rambert, 1810) J-J Estrangin ed, ch I, sect II, art II, § III (para 64).

[90] JP Van Niekerk, *The Development of the Principles of Insurance Law in the Netherlands 1500-1800* (Cape Town: Juta & Co, 1998) 429-30, 433.

[91] In jurisdictions where there was no public policy objection, specialist insurance might be obtained, for an appropriate premium, to cover slave mortality falling outside general cargo policies, and therefore covering even natural death: JP Van Niekerk, *The Development of the Principles of Insurance Law in the Netherlands 1500-1800* (Cape Town: Juta & Co, 1998) 433-34.

Slave Trade Acts of 1793 and later, however, also denied any claim in relation to any slave that was thrown overboard irrespective of the reason. This altered the pre-existing law.

Slaves are most likely to have been thrown overboard in the process of quelling a slave revolt on board a slave ship, by way of jettison to save the ship and remainder of the slaves if the ship was in danger of sinking, or by way of jettison to save the remainder of the slaves in case of shortage of water and food. The Slave Trade Act 1788[92] indicates that losses caused by insurrection, including losses incurred in quelling an insurrection, were a standard and accepted aspect of cover for slave cargoes,[93] although policies frequently excluded loss by insurrection below ten per cent of the cargo.[94] It has been estimated that approximately one in ten of slave voyages experienced an insurrection, although usually very few slaves died.[95] Jettison was a standard insured peril, covering the throwing overboard of cargo for good reason.[96] The potential for slaves to be jettisoned because of the state of the vessel or inadequacy of water was highlighted in *Gregson v Gilbert*,[97] in which the insured claimed in relation to 132 slaves

[92] Likewise Valin, *Nouveau commentaire*, as quoted in Weskett's *Complete Digest*, above.

[93] See *Jones v Schmoll* (1785) (1786) 1 TR 130n, 99 ER 1012, distinguishing between slaves killed in the quelling of a revolt and slaves who died as a result of the failed insurrection.

[94] J Weskett, *A Complete Digest of the Theory, Laws and Practice of Insurance* (London: Frys, Couchman & Collier, 1781) 11 ('Africa'). Such loss would, however, be admissible in general average: ibid.

[95] S Behrendt, D Eltis, D Richardson, 'The Costs of Coercion: African Agency in the Pre-Modern Atlantic World' (2001) 54 Econ Hist Rev 454, 463-4.

[96] *Butler v Wildman* (1830) 3 B & Ald 398, 106 ER 708 ('ex justa causa' per Bayley J, 403).

[97] (1783) 3 Dougl 232, 99 ER 629.

thrown overboard from the slave ship *Zong* over the course of a number of days,[98] because, it was pleaded, perils of the sea had so damaged and delayed the vessel that inadequacy of water for completion of the voyage with the full remaining cargo had necessitated the jettison of part of the cargo to save the rest. The claim succeeded at first instance, but a new trial was ordered because there was no evidence of the ship being in a perilous condition, the delay in the voyage having been caused instead by a navigation error, and because of a lack of clarity surrounding the throwing overboard of the slaves, and in particular whether this had happened before or after rain had permitted the collection of a significant quantity of additional water, and, therefore, whether this was a necessary act in the circumstances so as to qualify as the insured peril of jettison.

What remains unclear is precisely where, before the advent of the Slave Trade Acts, the limits lay to death caused by perils of the sea and where the line was drawn between such an insured loss and uninsured 'natural death'. Clearly, the insured would recover in cases of shipwreck but not in cases of death by disease, such as dysentery. The most difficult case concerns death from thirst or malnutrition where the vessel's supplies proved insufficient for the duration of the voyage. There appears to be no reported authority. It is suggested, however, that such circumstances would have been considered as causing natural deaths (and, therefore, uninsured losses) not only where the shortage was attributable to inadequate provisioning of the vessel at the outset by reference to what was prudent given the voyage to be undertaken, but also where

[98] On 29 November 1781, 54 women and children were thrown overboard. 42 male slaves were then thrown overboard two days later, with another 36 during the remainder of the voyage: A Lewis, 'Martin Dockray and the *Zong*: a Tribute in the Form of a Chronology' (2007) 28 J Leg Hist 357, 364, 369.

the vessel's provisioning met such a standard of prudence but the voyage was then delayed through the vessel being becalmed or encountering adverse winds. First, it is inconceivable that insurers would have agreed to underwrite inadequate provisioning, thereby providing a perverse incentive to minimise supplies of food and water at their own expense. And a distinction between inadequacy by reason of insufficient provisions at the outset and inadequacy by reason of the course of the voyage would have been extremely problematic to maintain, and all the more so a distinction between death attributable to lack of wind and death attributable to adverse winds. Secondly, incidents of slave mortality through inadequate food or water cannot have been rare, so that the lack of reported authority is telling. It is inconceivable that such losses did not occur, that insureds refrained from pursuing resulting claims they were in principle entitled to bring, and that insurers never defended any such claim on any ground whatsoever.[99] Thirdly, faced with inadequate water or food to sustain the life of

[99] This point was made by counsel for the insurer in the course of argument in *Gregson v Gilbert,* albeit that that case concerned a claim for a loss by jettison, not perils of the sea. As reported ((1783) 3 Dougl 232, 233; 99 ER 629), counsel's words are rendered in the following summary form: 'Many instances have occurred of slaves dying for want of provisions, but no attempt was ever made to bring such a loss within the policy.' A transcript of Granville Sharp's shorthand note reads as follows: 'knowing the sort of Vessels employed and how employed[,] is it possible to conceive from the beginning of the Trade to this Moment no slaves have ever Perished for want of Provisions or Water, is that to be supposed, that from the time the Portugeze discovered them to the present time no Slaves have ever Perished for want of Provisions or Water in a Voyage or is it to be conceived that those who have insured have been so indulgent in no Case whatsoever have they called the Underwriters to pay that loss[?]' See A Lyall, *Granville Sharp's Cases on Slavery* (Oxford: Hart Publishing, 2017) 255.

all on board until completion of the voyage, that death by the resulting thirst or starvation would constitute an uninsured loss would mean that killing an appropriate proportion of the slaves by throwing them overboard to save the remainder would secure the best financial outcome by transforming their death from uninsured 'natural death' to insured jettison. It has been suggested that such killing of slaves was rare,[100] but the fact that in *Gregson v Gilbert* the claim in principle succeeded demonstrates the financially, and barbarically, transformative potential of jettison.[101] There is evidence that some slave traders were aware of such insurance implications and prepared to act accordingly,[102] and the insurers in *Gregson v Gilbert* certainly alleged that the master of the *Zong* was so motivated.[103] Had death from inadequacy of water

[100] J Webster, 'The *Zong* in the Context of the Eighteenth-Century Slave Trade' (2007) 28 J Leg Hist 285, 292-93.

[101] The case 'almost too perfectly, and gruesomely, dramatized the horrific consequences of legal perversion in the name of profit: maritime insurance, that perfectly prudent commercial "safety net", also sanctioned calculated mass murder': A Rupprecht, '"A Very Uncommon Case": Representations of the *Zong* and the British Campaign to Abolish the Slave Trade' (2007) 28 J Leg Hist 329, 334.

[102] See the evidence quoted by J Webster, 'The *Zong* in the Context of the Eighteenth-Century Slave Trade' (2007) 28 J Leg Hist 285, 293.

[103] As pleaded in parallel proceedings initiated by the insurers in equity (seemingly after the first instance hearing in the Court of King's Bench, but rendered unnecessary by the successful motion for a new trial): see the Bill in the Court of Exchequer in A Lyall, *Granville Sharp's Cases on Slavery* (Oxford: Hart Publishing, 2017) 311, 318. Certainly, the fact that the throwing overboard commenced with 54 women and children substantiates the insurers' further allegation that the master and crew selected those who were least likely to survive the voyage

or food fallen within the scope of cover, however, there would have been no temptation to throw live slaves overboard. It is suggested, therefore, that all instances of death from succumbing to inadequate water or food were regarded as 'natural', and accordingly were uninsured under standard policies.

C. Three Cases

Chalmers identified three cases as establishing the principle codified by s 55(2)(b),[104] namely *Tatham v Hodgson* in 1796,[105] *Taylor v Dunbar* in 1869,[106] and *Pink v Fleming* in 1890.[107]

Tatham v Hodgson[108] concerned precisely the borderline case of slave mortality resulting from a shortage of provisions caused by adverse weather discussed above as a matter of common law, but which arose in the case under the terms of the Slave Trade Act 1794. The slave ship in question was considerably delayed by adverse weather such that the trans-Atlantic voyage that should have lasted between six and nine weeks in fact took over six months. In consequence, 128 out of 168 slaves died, largely because of lack of food they could tolerate.

(318-19) or indeed to generate the best price on arrival so that the greatest financial advantage would ensue from killing them to realise their insured value of £30 each.

[104] Sir M Chalmers and D Owen, *The Marine Insurance Act 1906*, 2nd edn (London: Butterworth & Co, 1913) 78.

[105] (1796) 6 TR 656, 101 ER 756.

[106] (1869) LR 4 CP 206.

[107] (1890) 25 QBD 356 (CA).

[108] (1796) 6 TR 656, 101 ER 756.

The slave owner claimed for a loss by perils of the sea, contending that there had been neither carelessness nor inhumanity of the master in failing to supply the vessel properly for such duration of voyage as might reasonably have been anticipated but rather an attenuation of the voyage beyond all reasonable anticipation by perils of the sea. The question was whether the death of the slaves amounted to 'mortality of slaves by natural death' under the Slave Trade Act 1794, preventing the insured from recovering under the policy. The court rejected the insured's claim, holding that the legislation was not to be undermined by admitting a claim for slave mortality by reason of perils of the sea other than arising directly from an external fortuity. Thus, according to Grose J:

> This is not a loss by perils of the seas, but a mortality by natural death: if we were to determine otherwise, we should open a door to the very mischiefs that the Legislature intended to guard against, because it would encourage the captains of slave ships to take an insufficient quantity of food for the sustenance of slaves.

Consequently, slave mortality resulting from delay, even if the delay was itself attributable to an external fortuity, could not found a claim permitted by the legislation for fear of encouraging owners and masters into inhumane parsimony when provisioning the ship for the trans-Atlantic crossing. In the language of the 1794 Act, any such mortality constituted a 'natural death'.

Tatham v Hodgson is concerned with the language of the Slave Trade Act 1794 rather than any general point of construction of standard marine policies. A contrary decision would, however, have required a departure from the previous understanding that mortality by reason of lack of provisions itself attributable to delay in prosecution of the voyage because of adverse weather

was not recoverable as a loss by perils of the sea, although the report contains no reference to the position before the advent of the slave trade legislation.

The second case identified by Chalmers is *Taylor v Dunbar*,[109] which concerned two shipments, one of pig carcasses and the other of beef carcasses, each of which was delayed by adverse weather while en route from Hamburg to London as a result of which they putrified and were necessarily jettisoned. In neither case was the meat directly affected by sea water or the adverse weather; in each case, the putrefaction was caused by the protraction of the voyage. The insured's claims for losses by perils of the sea failed. Three complementary lines of reasoning may be discerned in the short judgments delivered in the Court of Common Pleas. First, an insurer's liability depended on establishing loss caused by a covered peril. Although sea conditions constituted a peril of the sea, the absence of any direct impact of such conditions on the meat meant that those conditions did not constitute a proximate cause of the loss. Instead, the sea conditions caused a delay that in turn was the proximate cause of the putrefaction of the meat, but delay was not an insured peril.[110] Secondly, so many cargoes were necessarily susceptible to damage by delay that such damage should be regarded as similar to ordinary wear and tear or inherent vice, and as similarly not covered.[111] Thirdly, it was the settled view of the market that loss caused by delay was not covered by a policy on the standard Lloyd's SG form, probably because of the previous point, and a decision to the contrary would falsify the loss allocation applied by parties to cargo policies on innumerable occasions in the past.[112]

[109] (1869) LR 4 CP 206.

[110] ibid 210 (Keating and Montague Smith JJ), 211 (Brett J).

[111] ibid 210 (Keating J).

[112] ibid 211 (Montague Smith and Brett JJ).

Tatham v Hodgson was stated to be a precedent of general applicability with respect to delay,[113] surprisingly without reference to the slave trade legislation.

The third case is *Pink v Fleming*,[114] in which a cargo of citrus fruit was insured under a policy on the Lloyd's SG form but containing also the following clause: 'Warranted free from particular average, unless the ship be stranded, sunk or burnt, or unless damage be consequent on collision with any other ship.' A collision with another ship necessitated repairs to the carrying ship at a port of refuge, which in turn required the cargo to be off-loaded and then reloaded once the repairs had been effected, and caused the prolongation of the voyage for the time required for the repairs. On arrival at the port of destination, it was discovered that some of the fruit had rotted by reason of the cargo handling at the port of refuge and the delay in prosecution of the voyage. This being a case, therefore, of particular average (meaning partial loss), the insured could recover on the facts only if the loss was 'consequent on' the collision. It was common ground that this wording imported the test of proximate cause. The Court of Appeal rejected the claim. Again, the short judgments elide different, albeit interweaving, strands of reasoning.

First, and most prominently, the judgments afford an especially stark example of the now discredited 'last in time' approach to proximate cause, on which basis the cause of the damage was the cargo handling and the delay, not the collision. According to Lord Esher MR: 'To connect the loss with any peril mentioned in the policy, the plaintiffs must go back two steps,

[113] ibid 209 (Montague Smith J, arguendo).

[114] (1890) 25 QBD 356 (CA).

and that, according to English law, they are not entitled to do.'[115] Secondly, alternatively, the cause of the loss was the inherent susceptibility of the cargo, being perishable, rendering it vulnerable to the cargo handling and delay.[116] Thirdly, even without the warranty, the insuring clauses in the policy did not mention cargo handling or delay.[117]

Taylor v Dunbar and *Pink v Fleming* share the proposition that loss of or damage to cargo caused by delay in the prosecution of the voyage is not caused by an insured peril at common law. *Tatham v Hodgson* comes to an analogous holding in the context of specific legislation, although its approach is considered in *Taylor v Dunbar* to be of general applicability. This reasoning has two aspects to it. First, delay in the course of a voyage by reason of adverse weather or other maritime occurrence is not of itself a peril of the sea. This reflects the innate susceptibility of so many cargoes to loss caused by delay as commercially to require such loss to be treated contractually in the same way as ordinary wear and tear, namely as lacking the requisite fortuity, or alternatively as caused by inherent vice. To this must be added in the particular context of slave cargoes the legislative policy underpinning the Slave Trade Acts. Secondly, where an insured peril gives rise to a delay that causes the loss of or damage to cargo, such loss or damage is not caused by the insured peril so as to give rise to a claim under the policy. There is no claim, therefore, because the proximate cause of the loss (delay) is not an insured risk and any covered peril that caused the delay is not a proximate cause of the loss. In terms of the characterisation of limitations on cover, since the loss is properly analysed as not prima facie caused by a covered peril, there is no scope for the operation of an exclusion *stricto*

[115] ibid 398. In similar vein, ibid per Lindley LJ.

[116] ibid 399 (Bowen LJ).

[117] ibid (Lindley LJ).

sensu. Delay is an excepted peril: so analysed, s 55(2)(b) serves merely to emphasise one source of loss for which insurers are not liable, but they are not liable in any event because there is no proximate cause within the insuring clause.

This analysis, however, requires reconsideration in the light of the unequivocal abandonment, twelve years after the passing of the Marine Insurance Act in *Leyland Shipping Co v Norwich Union Fire Insurance Society*,[118] of the last-in-time approach to determining proximity of causation in favour of an approach focusing on effectiveness and dominance.[119] But first, it is worth considering a further nineteenth-century case in relation to cargo. Moreover, a full account of the impact of evolving causation rules requires consideration of developments in relation to loss of time and freight, and also the treatment of delay in United States marine insurance law.

D. 'Warranted Free Of Mortality'

Lawrence v Aberdein[120] concerned a policy on 70 live animals under which cover was stated to be 'warranted free of mortality and jettison'. When all except six of the animals died as a

[118] [1918] AC 350 (HL).

[119] Although already in *Montoya v London Assurance Co* (1851) 6 Exch 451, 458, Pollock CB had stated: 'I think it may be laid down as a general rule, that where mischief arises from perils of the seas, and the natural and almost inevitable consequence of that mischief is to create further mischievous results, the underwriters, in such case, are responsible for the further mischief so occasioned.'

[120] (1821) 5 B & Ald 107, 106 ER 1133.

result of injuries sustained when the carrying ship was caught in a violent storm, the insurers argued that this 'mortality' exclusion covered all instances of death. This argument was rejected because, first, the term 'mortality' was more naturally associated with death by natural causes rather than by reason of extraneous accident, and, secondly, affording the warranty such a wide ambit would produce the uncommercial, indeed 'absurd',[121] result that in a case where an animal received injuries rendering it of no value the insured would be better off if the animal succumbed to those injuries than if it survived. The four judgments divide, however, on the precise contractual function of the warranty. For Abbott CJ, the warranty articulated the limits on cover established in *Tatham v Hodgson* for a policy on live cargo outside the slave trade legislation. Moreover, such express contractual provision was indeed necessary as otherwise insurers would be liable for a loss by perils of the sea. Having discussed *Tatham v Hodgson*, he continued as follows:

> If the ship, in this case, had been driven out of her course by the perils of the sea, and the voyage thereby had become so protracted as to exhaust all the provisions, and, consequently, the means of sustaining the life of the animals insured, I think that the words 'warranted free from mortality,' introduced into this policy, would have protected the underwriters from the loss for which they otherwise would have been liable, as for a loss arising from the perils of the sea.[122]

[121] ibid 113 (Bayley J), 115 (Holroyd J).

[122] ibid 111.

Likewise, Best J came to the conclusion that 'the underwriters must be taken to have intended to exempt themselves, by this exception, from that species of loss which occurred in *Tatham v Hodgson*'.[123]

For Holroyd J, in contrast, the warranty was not intended to detract from the cover granted in respect of loss by any of the named perils in the SG policy but only to qualify the concluding phrase to the traditional insuring clause, so that the policy rendered the insurers liable for 'losses by perils of the seas, and all other losses except losses by mortality and jettison.'[124] On the facts, the warranty did not protect the insurers since the term 'mortality' denoted death from natural causes rather than the violent death that had occurred.[125] Bayley J did not address the matter in clear terms but appears to have considered that the warranty would cover death caused by natural causes such as disease by reason of either simple prolongation of the voyage or a peril of the sea such as tempestuous weather, although insurers under a standard SG policy would be liable only in the latter case.[126]

The judgments in *Lawrence* differ in their analysis of the mortality warranty. They do not accord with the law as discussed above in relation to the insurance of slaves in so far as they consider insurers in principle liable for a loss by perils of the sea where mortality results from an inadequacy of provisions by reason of delay in the prosecution of the voyage because of

[123] ibid 116-17.

[124] ibid 114.

[125] ibid 115-16.

[126] ibid 112-13.

adverse weather, rejecting the explicit contention to the contrary by counsel for the insurers.[127] Yet, as discussed above, insurance law before the slave trade legislation did not consider slaves as subject to special rules: the relevant provision in the London Code speaks of slaves and cattle, while the market understanding of insurance policies obtained by Lord Mansfield between hearings in *Gregson v Gilbert* applied equally to horses as to slaves.[128] The views expressed in *Lawrence* had, however, little impact in subsequent cases. In *Taylor v Dunbar*,[129] Montague Smith J distinguished *Lawrence v Aberdein* as holding insurers liable for physical injury sustained directly through being knocked around in the vessel, without reference to the discussion of the mortality warranty. *Lawrence* was not cited at all in *Pink v Fleming*.[130]

In departing from the contemporary understanding of marine policies, it is submitted that the judgments in *Lawrence* fell into error, although not in the decision reached in the case. It is notable that the warranty denied liability not only for mortality but also jettison. The parallel with the exclusion under the slave trade legislation of cover for death by natural causes or ill-treament and for jettison is striking. It seems likely that *Tatham v Hodgson* had highlighted the statutory limits to insurance cover in relation to slaves and the warranty was designed to replicate those limitations in relation to live cargo outside the legislation. Although no warranty was required in relation to death by natural causes, confining the warranty to death by ill-

[127] ibid 109, citing in support Pothier, *Traité du Contrat d'Assurance* and Valin, *Nouveau Commentaire* (above, n 86).

[128] Indeed, in *Montoya v London Assurance Co* (1851) 6 Exch 451, 454; 155 ER 620, 621, counsel referred to *Gregson v Gilbert* and *Tatham v Hodgson* as concerned with cattle.

[129] (1869) LR 4 CP 206, 210-11.

[130] (1890) 25 QBD 356 (CA).

treatment and to jettison would have exposed insurers to an argument that the intention had been to render the insurer liable for death by natural causes.

E. Delay And Freight

Section 55(2)(b) states that it applies to policies on ships or goods, reflecting a different interaction between perils, delay in the provision of a ship's services, and freight. Where a vessel on voyage charter is damaged so as to cause a delay in the prosecution of the voyage sufficient to frustrate the contract, there is an immediate loss of freight at risk. The peril that damages the vessel has, therefore, a direct impact upon the freight. In *Jackson v Union Marine Insurance Co Ltd*,[131] a vessel on voyage charter ran aground the day after departure, causing a delay that frustrated the charterparty and the loss of the chartered freight. The shipowner was held entitled to recover under its freight policy for a loss caused by perils of the sea. Although the reason why the grounding caused the loss of the freight was because of the length of the delay it caused in the prosecution of the voyage, the grounding was the proximate cause of the loss of freight. According to Bramwell B: 'The perils of the seas do not cause something which causes something else.'[132] Likewise with respect to time charterparties, where an insured peril damages the chartered vessel so as to render it unable to provide the contractual services to the charterer for such a duration as to frustrate the time charterparty, the insurer is in principle liable for the ensuing loss of charter hire as caused by the insured peril.[133] More commonly, an insured peril will cause a hiatus in the availability of a time-chartered vessel to the charterer so

[131] (1874) LR 10 CP 125.

[132] ibid 128.

[133] *Bensaude v Thames & Mersey Marine Insurance Co Ltd* [1897] AC 609 (HL).

as to trigger an off-hire clause. Again, the peril is the proximate cause of the ensuing loss of hire.[134]

In the context of cargo insurance in contrast, damage to the vessel does not immediately damage the goods. Prospective delay of sufficient duration causes an immediate loss of the contingent contractual right that is freight at risk but no extent of prospective delay damages the tangible chattels that are goods. The inevitability of a sufficient delay may render future damage inevitable, but insurance policies cover actual losses not prospective losses.

The insurers' response was to draft an exclusion appropriately worded to carve out of the cover losses of freight or time charter hire whenever loss of time formed an integral part of the claim irrespective of what constituted the proximate cause of the loss. An exclusion of 'any claim consequent on loss of time, whether arising from a peril of the sea or otherwise'[135] acknowledges that an insured peril that induces a delay in the provision of the contractual services constitutes the proximate cause of the resulting loss of freight or hire while barring any claim in respect of that loss where the insured needs to assert a lapse of time as one of the constituent facts supporting the claim.[136] The 'loss of time' clause, accordingly, has been stated

[134] *Inman Steamship Co v Bischoff* (1882) LR 7 App Cas 670 (HL) 690; *The Alps* [1893] P 109; *The Bedouin* [1894] P 1.

[135] Included now in the Institute freight clauses.

[136] *Robertson v Petros M Nomikos Ltd* [1938] 2 KB 603 (CA) 628-29. The clause is, therefore, inapplicable where insured peril causes loss of a chartered ship, since the freight is lost by reason of the ship's loss and not because of an ensuing lapse of time: *Roura & Forgas v Townend* [1919] 1 KB 189, 196-97 (wartime capture of voyage chartered ship); *Carras v*

or held to exclude the insurer's liability in relation to claims involving frustration of adventure under charterparties, both voyage[137] and time,[138] or partial loss of freight,[139] and also in relation to claims for loss of hire by virtue of off-hire clauses under time charterparties,[140] although some questions have been raised regarding the true interpretation and scope of the exclusion.[141]

London & Scottish Assurance Corp Ltd [1936] 1 KB 291 (CA); *Robertson v Petros M Nomikos Ltd* [1939] AC 371 (HL) 387 (voyage chartered ships so damaged by peril of the sea (*Carras*) and fire (*Robertson*) that cost of repairs would exceed value once repaired).

[137] *Robertson v Petros M Nomikos Ltd* [1938] 2 KB 603 (CA) 629; *Turnbull, Martin & Co v Hull Underwriters Association Ltd* [1900] 2 QB 402.

[138] *Bensaude v Thames & Mersey Marine Insurance Co Ltd* [1897] AC 609 (HL), discussed below, text to n 152.

[139] *Scottish Shire Line Ltd v London and Provincial Marine and General Insurance Co Ltd* [1912] 3 KB 51 (albeit a contract of affreightment other than a charterparty, and a non-standard exclusion inapplicable on its wording).

[140] *Re Jamieson and the Newcastle Steamship Freight Insurance Association* [1895] 2 QB 90 (CA) 96; *Naviera de Canarias SA v Nacional Hispanica Aseguadora SA (The Playa de las Nieves)* [1978] AC 853 (HL).

[141] *Robertson v Petros M Nomikos Ltd* [1939] AC 371 (HL) 377-78; *Naviera de Canarias SA v Nacional Hispanica Aseguadora SA (The Playa de las Nieves)* [1978] AC 853 (HL) 883. See also *Atlantic Maritime Co Inc v Gibbon* [1954] 1 QB 88 (CA) 126-28, but cf 138-39. Again, in *Mercantile Steamship Co Ltd v Tyser* (1881) 7 QBD 73, the exclusion was held inapplicable where a loss of time gives the charterer a right to exercise a contractual cancellation right which it duly exercises, the proximate cause of the ensuing loss of freight being the exercise of the cancellation right. But this appears incompatible with the later House of Lords decision in

F. Delay In United States Case Law

The intervention of delay in the context of cargo insurance elicited a very different analysis in the United States, with a strong line of authority rejecting the causation analysis of *Pink v Fleming*. In *Lanasa Fruit Steamship & Importing Co Inc v Universal Insurance Co*,[142] a cargo of perishable fruit was insured against risks including perils of the sea. The carrying vessel stranded in the course of the voyage and, although no water entered the vessel, as a result of the ensuing delay the cargo rotted so as to become a total loss. Given that stranding qualified as a peril of the sea, the United States Supreme Court held that the only question was whether the loss was proximately caused by the stranding. The Court referred to the exposition by the House of Lords in *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd*[143] of proximate cause as determined not by timing but by efficiency. On that basis, there could be no doubt that the loss in question fell within the policy terms. The real debate was the significance in American law of the English cases on delay, notably *Taylor v Dunbar* and *Pink*

Bensaude v Thames & Mersey Marine Insurance Co Ltd [1897] AC 609 (HL), in which, however, *Tyser* was not cited. It is also worth noting that while, in the context of this exclusion clause, the phrase 'consequent on' is read as denoting a more attenuated causal link than that required by proximate causation, it was common ground in *Pink v Fleming* (1890) 25 QBD 356 (CA) that the phrase denoted exactly the same causal link, albeit in a differently structured insuring clause. Modern marine policies also routinely include a separate exclusion in relation to frustration of adventure, discussed below, text to n 155.

[142] 302 US 556 (1938).

[143] [1918] AC 350 (HL).

v Fleming. The Supreme Court held that the approach to causation adopted in *Pink v Fleming* was incompatible with *Leyland Shipping* and noted that American law was not encumbered by a statutory codification of what might otherwise be regarded as outmoded case law. The Court was therefore free to confirm, and did confirm, the approach adopted in a series of American cases in which, according to Story J in *Magoun v New England Marine Insurance Co*,[144] '[a]ll the consequences naturally flowing from the peril insured against, or incident thereto, are properly attributable to the peril itself'. Where, in consequence, a delay was the natural consequence of an insured peril the damage resulting from that delay was proximately caused by the insured peril so as to render the insurers liable. Thus, in *Magoun*, the carrying vessel was detained for violation by its master of customs regulations in relation to a quantity of beans and by the time the vessel was released the insured cargo of hides had rotted. Story J rejected an argument that the detainment (an insured peril) was only a remote cause and that the proximate cause was delay. Of particular note for the Supreme Court was *The Corsicana*,[145] a case of strikingly similar facts to *Pink v Fleming*, in which a collision forced the carrying vessel to put into a port of refuge for repairs. The vessel and its cargo of potatoes were able to resume the voyage, but the cargo, although untouched by sea water, started to sprout and rot as a result of the delay, forcing abandonment of the voyage and sale of the cargo at an interim port. It was held that:

> The proximate cause of the loss, therefore, was the sea peril, because it was the efficient dominant cause, which, although incidentally involving delay, placed the cargo in such

[144] 1 Story 157 (1840).

[145] *Brandyce v United States Lloyds (The Corsicana)* 207 App Div 665, 203 NYS 10, affirmed 239 NY 573, 147 NE 201 (1924), [1924] AMC 365.

> a condition that, because of inevitable deterioration or decay, it could not be reshipped and carried to its destination.[146]

The insurers were therefore liable. Likewise, the Supreme Court held the insurers liable on the facts of *Lanasa Fruit* itself.

The American cases do not hold that delay in the prosecution of a voyage is itself a peril of the sea. This may be because delay in transit can occur on land so that it lacks the requisite maritime character, or because it is such a natural incident of a sea voyage that it lacks the requisite degree of fortuity, which latter reasoning will also deny the presence of any 'risk' in the context of modern 'all risks' cargo insurance. Rather, the American cases hold the insurer liable because an insured peril impacts on the insured property, the ensuing loss is a natural consequence of the impact of the insured peril, and the delay that forms part of the natural flow of events between the advent of the insured peril and the incurring of the loss cannot be regarded as interrupting that natural flow so as to displace entirely the insured peril as the proximate cause of the loss. The delay, consequently, has no contractual relevance absent an express contractual stipulation to the contrary, and the insurer is liable for the loss.

The response of American insurers to the *Lanasa Fruit* decision mirrored that of English insurers in the context of freight, namely the incorporation of an exclusion carving losses

[146] 207 App Div 665, 669-70 (Rich J).

involving delay out of the cover otherwise provided.[147] The Delay Clause provides as follows: 'Warranted free of claim for loss of market or for loss, damage or deterioration arising from delay, whether caused by a peril insured against or otherwise.' Insurers are not liable, therefore, for any loss that arises through delay regardless of the operation of an insured peril and without any requirement for the delay to constitute the proximate cause of the loss. Insurers were, accordingly, not liable under a cargo policy on grain being transported in barges on the Mississippi when the United States Coast Guard halted river traffic because of flooding, many barges were delayed, and the grain they were carrying deteriorated. The loss 'arose from' delay and it was irrelevant that the flooding constituted an insured peril.[148]

G. Delay In Modern English Insurance Law

As a matter of principle, the causation analysis in the American cases is compelling. In the light of *Leyland Shipping*, where an insured peril leads as a necessary consequence to a delay and thereby to a loss, the insured peril must be recognised as having proximate cause status in relation to the loss. English law, of course, has to address the statutory intervention of s 55(2)(b). On the basis that *Leyland Shipping* renders untenable the causation analysis in *Taylor*

[147] *Archer-Daniels-Midland Co v Phoenix Assurance Co*, 975 F Supp 1137 (1997) (Illinois District Ct, SD), citing L Buglass, *Marine Insurance and General Average in the United States*, 2nd edn (Centreville: Cornell Maritime Press, 1981) 79-81.

[148] *Archer-Daniels-Midland Co v Phoenix Assurance Co*, 975 F Supp 1137 (1997) (Illinois District Ct, SD).

v Dunbar and *Pink v Fleming*,[149] the question is whether this forces an alteration of result in such cases.

The traditional English cases treat delay as an excepted peril. The peril that induces the delay, even if insured, is not a proximate cause of the loss and therefore not contractually relevant. The insurer, therefore, is not liable irrespective of the delay. Articulating in s 55(2)(b) a rule of non-liability focused on delay may endeavour to clarify the position but alters nothing. However, once the *Leyland Shipping* approach to proximity of causation confers contractual relevance on the delay-inducing peril, the question is then whether the delay can change status from excepted peril to excluded peril. If both the delay and the peril that induces it qualify as proximate causes, the insurer's absence of liability would be preserved by a delay exclusion, attracting contractual priority following the approach in cases such as *Wayne Tank & Pump*. Section 55(2)(b) would imply such an exclusion into policies, and in any event, as already noted, the Institute cargo clauses expressly reiterate the absence of liability in relation to loss (proximately) caused by delay. All then turns on the preparedness of courts to recognise concurrent proximate causes both generally and also in the specific context of natural chains of events. If delay is not recognised as a proximate cause, alongside the peril that induced the delay, the limitation on cover stated by s 55(2)(b), together with the derivative provisions in the Institute cargo clauses, will fall into irrelevance. If delay is recognised as a proximate cause, the limitation will continue to apply, with a changed characterisation from exception to exclusion.

[149] An argument that s 55(2)(b) compels the retention in English law of a perverse island of last-in-time proximity of causation is clearly unattractive and surely unsustainable.

Of course, it is always open to insurers to remove uncertainty from their policies by modifying the express delay clause as English insurers did in the context of freight when responding to *Jackson v Union Marine* and American insurers did in the context of delay and cargo when responding to *Lanasa Fruit*. All that is required is a dilution of the requisite causal link between the delay and the loss. However, comprehensive and reliable exclusion of all losses to which a loss of time makes an instrumental contribution irrespective of the operative peril requires careful drafting.

In *Russian Bank for Foreign Trade v Excess Insurance Co Ltd*,[150] a consignment of barley was insured under a policy that excluded 'all claims due to delay' for a voyage from a port in the Black Sea to England. After loading, however, the voyage was frustrated by the closing of the Dardanelles by the Turkish government, the goods were subsequently discharged into a warehouse to prevent damage by heating, and the carrying vessel was requisitioned. The insured claimed for a constructive total loss of the goods by frustration of adventure[151] caused

[150] [1918] 2 KB 123.

[151] The concept of loss when applied to cargo includes not just physical loss but also loss of market so that a loss arises where goods are detained in their transit for a sufficient duration to frustrate the commercial adventure even if they remain safe and at the disposal of the insured: *British & Foreign Marine Insurance Co Ltd v Samuel Sanday & Co* [1916] 1 AC 650 (HL) 656, 662; *Rickards v Forestal Land, Timber & Railways Co* [1942] AC 50 (HL) 71. Alternatively, the cargo may be conceptualised as including the commercial adventure upon which it is embarked, so that loss of the adventure constitutes a loss of the insured subject-matter (*Sanday*, 668, 672), or a cargo policy may be considered as covering the composite

by the insured peril of restraint of princes. Bailhache J held that the goods had indeed been so lost. However, since the restraint rendered the insured goods a constructive total loss only because of its (anticipated) duration, Bailhache J further held the claim to be barred by the exclusion. In so holding, he followed *Bensaude v Thames & Mersey Marine Insurance Co Ltd*[152] in which an insured peril of the sea caused the breakage of a propeller shaft of a time-chartered ship necessitating repairs of such a duration as to frustrate the charterparty, resulting in the loss of the charter hire. The House of Lords held that the claim for the lost hire was barred by an exclusion of 'any claim consequent on loss of time, whether arising from a peril of the sea or otherwise'. The delay in prosecution of the voyage arose from the damage caused by a peril of the sea. That damage so caused did not in and of itself occasion the loss of hire; the length of the resulting interruption to the ship's ability to provide the contractual services was critical because that determined whether the contractual adventure was frustrated. The loss of hire was, therefore, 'consequent on loss of time'. For Bailhache J, both *Bensaude* and *Russian Bank* involved insured perils causing a delay that in turn caused a loss of freight, so that the efficacy of the exclusion recognised in *Bensaude* was equally present in *Russian Bank.* The parallel has, however, been doubted. In *Bensaude*, the breakage was complete without the ensuing delay, which was a consequence of, rather than an integral part of, the breakage. The facts, therefore, fitted an exclusion clause that contemplated an intermediate event (namely a loss of time) between an insured peril and a loss.[153] A peril of inhibition, in contrast, necessarily

subject-matter of 'chattels-cum-adventure' (*Rickards*, 90-91 (Lord Wright), and see also 64-65, 106-07).

[152] [1897] AC 609 (HL).

[153] See *Naviera de Canarias SA v Nacional Hispanica Aseguadora SA (The Playa de las Nieves)* [1978] AC 853 (HL) 882.

involves a temporal dimension that determines the nature and quality of the peril: a restraint has no import divorced from its duration, actual or reasonably estimated.[154] On that basis, therefore, it may plausibly be suggested that such a peril cannot give rise to a claim barred by the standard loss of time exclusion, because there is no distinct intermediate event between the peril and the loss. If that is correct, it does not mean that a loss of time exclusion clause cannot work in respect of such perils, merely that it requires different drafting from the well-established loss of time exclusion.

Claims for loss by reason of frustration of adventure are often addressed by a dedicated exclusion separate from a loss of time exclusion. The standard London market forms for the insurance of cargo against war risks and strikes risks exclude 'any claim based upon loss of or frustration of any voyage or adventure'.[155] Such a clause, however, will protect an insurer only where the sole claim that can be brought by the insured is for loss by frustration of adventure. In *Rickards v Forestal Land, Timber & Railways Co Ltd*,[156] the abandonment of their voyages by German vessels on the instructions of the German government (constituting the insured peril of restraint of princes) on the outbreak of the second World War caused a total loss of their British-owned cargoes and also frustrated the voyages. A claim for loss of the goods by restraint of princes not being dependent on frustration of adventure was not barred by the exclusion clause.

[154] *Atlantic Maritime Co Inc v Gibbon* [1954] 1 QB 88 (CA) 126-27.

[155] Institute War Clauses (Cargo) (1/1/09), cl 3.7; Institute Strikes Clauses (Cargo) (1/1/09), cl 3.8. Likewise the corresponding Institute freight clauses.

[156] [1942] AC 50 (HL).

VI. MODERN FORMS

The discussion of exceptions has concentrated on the provisions of s 55(2) of the Marine Insurance Act. As noted, however, the provisions of the Act are often, albeit not always, restated explicitly in the Institute cargo clauses together with a number of other provisions detailing instances of loss and damage not covered by the policy, all grouped under a heading 'Exclusions'. Such presentation in the modern forms, however, appears to be directed merely to the question of (absence of) cover and not to the technical legal characterisation of the specific restriction.

In *The Wondrous*,[157] a chartered vessel was unable to leave port because of non-compliance with a formality necessary for customs clearance. Had it sailed without compliance, it would have infringed customs regulations and been forcibly stopped. A sustained delay ensued, resulting in a loss of hire under the charterparty. A policy on hire covered loss 'in consequence of the risks enumerated in the Institute War and Strikes Clauses Hulls-Time 1.10.83'. The insured perils as stipulated in cl 1 of those War and Strikes Clauses include 'detainment' while cl 4 carries the heading 'Exclusions' and specifies that the insurance does not cover, inter alia:

> 4.1 loss damage liability or expense arising from
>
> …
>
> 4.1.5 arrest restraint detainment confiscation or expropriation under quarantine regulations or by reason of infringement of any customs or trading regulations

[157] *Ikerigi Compania Naviera SA v Palmer (The Wondrous)* [1992] 2 Lloyd's Rep 566 (CA).

4.1.6 the operation of ordinary judicial process, failure to provide security or to pay any fine or penalty or any financial cause.

The insured argued that the vessel's inability to leave port constituted a 'detainment' within the meaning of cl 1 while the exclusion in cl 4.1.5 was inoperative because the term 'infringement' denoted an actual infringement. The Court of Appeal rejected this argument. The modern Institute clauses represented a fresh presentation of marine insurance contracts, but the intention was to jettison the archaic and confusing wording of the older policies, including the venerable SG form, not to revolutionise the substance of the transaction. The cover conferred by the traditional phrase 'arrests, restraints, and detainments of all kings, princes, and people' was understood, as stated by r 10 of the Rules for Construction of the SG Policy set out in Schedule 1 to the 1906 Act, as referring to 'political or executive acts'. While the drafters of the modern clauses referred in the insuring clause to 'arrest restraint or detainment' with no gloss or restriction, cll 4.1.5 and 4.1.6 were designed to preserve the traditional scope of cover. According to Lloyd LJ:[158]

> [I]t was important to preserve the essential meaning of the terms in the context of a war risks policy, namely, that they refer to political or executive acts: see r 10 of the Rules of Construction. This is the function of cll 4.1.5 and 4.1.6. It would, I think, be a mistake to regard cl 1.2 as defining the perils, and cll 4.1.5 and 4.1.6 as providing exceptions to liability in specified circumstances. That may be true of cll 4.2-4.4. But it is better to regard 4.1.5 and 4.1.6 as part of the definition of the peril itself. It is identifying the sort of arrest, restraint or detainment which the draftsman had in mind.

[158] ibid 572.

Consequently, the correct analysis was not that there was a detainment within the meaning of the insuring clause but cover was denied by the operation of an exclusion; rather, cl 4.1.5 had to be read as part of the insuring clause, furnishing part of the definition of the insured peril of detainment, so that there was no peril within the meaning of the insuring clause in the first place. Clauses 4.1.5 and 4.1.6 are therefore neither exceptions nor exclusions. Absent those provisions, the scope of the insuring clause would be wider; they do not simply render explicit that which is implicit but articulate essential (limiting) features of some of the insured perils. However, although they modify the cover that otherwise would be afforded, cll 4.1.5 and 4.1.6 are not exclusions, the applicability of which must be proved by the insurer, but part of certain insured risks the operation of which must be proved by the insured. Equally, it would be inaccurate to analyse an occurrence within cll 4.1.5 or 4.1.6 that leads to a peril of deprivation of possession within cl 1 as giving rise to two proximate causes, one insured and one excluded, and triggering a contractual priority contest to be resolved in favour of an express exclusion. Instead, there will not be an insured peril in the first place.

A similar response refuted a more extreme argument made at first instance, namely that the reference in the insuring clause of the hire policy to 'risks enumerated' in the War and Strikes Clauses should be read as referring only to cl 1 of the War and Strikes Clauses which listed the perils insured against and, therefore, as precluding any consideration of the 'exclusions' under cl 4. Hobhouse J held, however, that determining the extent of this referentially defined cover required the insuring clause in the War and Strikes Clauses to be read together with the 'exclusions' in cl 4. This was both because, as a matter of commercial substance, the insuring clause and the exclusions combined to form one coherent scheme of cover the different aspects of which could not sensibly be separated, and also because severing cl 1 from cl 4 would

contradict the express wording of the insuring clause which stated that the cover provided was 'subject to the exclusions hereinafter referred to'. The hire policy referred to the 'risks' covered by the War and Strikes Clauses: 'The risks are the perils with the exclusions; together they delimit the risks covered.'[159]

The wording highlighted by Hobhouse J, or similar wording, is present in many sets of Institute clauses. Cargo clauses, for example, routinely state that cover is 'except as provided in [stipulated clauses] below'. Does such wording assist in the correct characterisation of the stipulated clauses as integral parts of the definition of the risks covered by the insuring clause, rather than as clarificatory exceptions to such risks or as carve-out exclusions from such risks? That, of course, was not the issue addressed by Hobhouse J, who was concerned rather with the extent of the provisions of the War and Strikes Clauses referenced by the hire policy. And it is suggested that the highlighted or similar wording does not, at least of itself, resolve the characterisation issue. First, the natural meaning of the words does not clearly denote any particular characterisation: irrespective of their characterisation, the stipulated clauses express limitations on the scope of cover provided under the policy. Secondly, such wording was not relied upon by the Court of Appeal. Thirdly, some of the stipulated clauses are also found as 'exclusions' in Institute clauses that do not contain any connecting qualification in the insuring clause.[160] The commercial rationale for a different characterisation depending on the presence or absence of a connecting qualification is elusive.

[159] [1991] 1 Lloyd's Rep 401 (Com Ct) 416. There was no appeal on this point.

[160] For example, the Institute time and voyage clauses for hulls, and the International hull clauses.

It may be recalled that the presumptive absence of inherent vice cover as stated by s 55(2)(c) is properly characterised as an exception to cover and not an exclusion from cover. The same is true of the express denial of cover in relation to loss or damage caused by inherent vice under the Institute cargo clauses,[161] which, according to Lord Mance JSC in the context of the Cargo Clauses (A), 'simply makes clear the continuing relevance in the context of all risks cover of the limitation on cover against perils of the sea provided by section 55(2)(c).'[162] Consequently, the true nature of an express limitation on cover (as an integral part of the definition of the insured perils, as a clarificatory exception, or as an exclusion properly so called) depends not on the label it carries in the policy but on a full consideration of the function of that limitation in the context of the policy as a whole, which in the case of modern marine policies may include its origins in older forms of policy.

VII. CONCLUSION

A correct reading of a marine policy requires awareness of different types of provision employed to delineate the scope of cover and careful attention to the interplay between those provisions. In particular, care must be taken to distinguish from exclusions properly so called both clauses that are properly read as integral to the insuring clauses and also exceptions. The statement in s 55(1) of the Marine Insurance Act 1906 that insurers are not liable for losses not proximately caused by insured perils may appear to be a statement of the obvious but in fact encapsulates the essence of the policy exception, into which category, on the analysis current

[161] Institute Cargo Clauses (A) (1/1/09), cl 4.4.

[162] *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad (The Cendor MOPU)* [2011] UKSC 5, [2011] 1 Lloyd's Rep 560 [88].

at the time of drafting of the Act, fell the various perils listed in s 55(2). That characterisation remains accurate today, except perhaps in relation to delay in that preservation of the limits on cover as traditionally understood requires, in the light of the post-1906 Act rejection of the last-in-time approach to proximity of causation, analysis of delay as an excluded concurrent proximate cause, although any doubt about whether the traditional scope of cover continues to prevail could be removed contractually by amending the wording of the delay provision in the Institute cargo clauses. More broadly, characterisation as either an exception or exclusion will dictate the correct reading of the policy in cases of concurrent proximate causes. The labelling of terms as 'exclusions' in the Institute cargo clauses indicates limitations on the scope of cover but not the technical characterisation of the terms so labelled.